COPY

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF APACHE

STATE OF ARIZONA,	
Plaintiff,	APACHE COUNTY SUPERIOR COURT CASE NO. CR20100047
vs.	DIVISION ONE COURT OF APPEALS CASE NO. 1 CA-CR 11-0101
JOSEPH DOUGLAS ROBERTS,	
Defendant.	

TRANSCRIPT OF ORAL ARGUMENT HEARING

September 27, 2010

BEFORE THE HONORABLE DONNA J. GRIMSLEY

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C O N T E N T S

PROCEEDINGS

(Proceedings commenced at 1:08:44 p.m.)

THE COURT: All right. This is *State of Arizona versus Joseph Roberts*. It's CR2010047. Mr. John Beatty is here for the State.

MR. BEATTY: Yes, Judge. Good afternoon.

THE COURT: And Mr. David Martin for Mr. Roberts, who's also present. This is the date and time set for oral argument on Defendant's Motion for Review of Preliminary Hearing.

Are we ready to proceed with that, counsel?

MR. BEATTY: Yes, Judge --

THE COURT: Okay.

MR. BEATTY: -- we are.

THE COURT: Mr. Martin, whenever you're ready, you may begin.

THE COURT: Thank you, Judge.

ORAL ARGUMENT

BY MR. MARTIN:

Judge, the way I was hoping to approach this is to address the motion to dismiss first. In my mind, that is intricately interwoven with the motion for review of the probable cause determination.

Your Honor, I'm aware the State had filed, I think,

back around September 10th or so a motion -- or a response to the motion, and it was -- and we filed -- I was out of the office. At the time it was file, it was emailed me, and I -- during my absence, was reviewing it. I didn't start the drafting of it though until returning to the office last Monday, and I'm aware the Court had given me until Thursday to do a reply. I have a partial reply drafted on that. I'd like to submit it, though it's not currently timely, but it covers a few of the points that I otherwise would --

THE COURT: Thank you.

MR. MARTIN: -- have addressed. And where do you want this? Here?

I don't know if you will know as much, Judge, when I get to that part, but that's where we'll start the response to a motion to dismiss. Judge, in essence, what we are seeking, and our objective, our request to the Court is that you conduct a *Warner* hearing on this case.

And by a *Warner* hearing, I mean, I'm asking you to set this matter down for a hearing to determine whether or not the actions of the former prosecutor on this case, acting on behalf of the State, and what they did on the eve of the preliminary hearing rose to the level where it effectively or functionally interfered with my client's right to effective assistance of counsel.

In that regard, I'd like to point out the following:

Number one: What happened on the eve of the preliminary hearing was a clear violation of *Edwards versus Arizona*. Also equally clear, I would submit, is that *Montejo versus Louisiana*, which had overruled *Michigan versus Jackson*, actually reaffirmed *Edwards*.

The way Judge Scalia wrote that opinion, in my view of it, it's abundantly clear that when faced with the criticism from the other four members of the Supreme Court in overruling *Michigan versus Jackson*, part of his response was, "Well, we still have *Edwards* so we don't have to all get too excited here. We still have *Edwards* that protects the right to counsel once it's been invoked."

So *Montejo* -- the point is *Montejo* didn't authorize, contrary to Mr. Brannan's statements, the State going to a represented client, a client who has -- the Defendant who has invoked his right to counsel, and visiting with him about anything whatsoever, there's no safe harbor there for the State to do that sort of thing.

Unfortunately in this case, the conduct that occurred during that contact Deputy Hounshell and to a much lesser extent -- or not Deputy Hounshell, but investigator Hounshell and investigator Jaramillo to a lesser extent did infringe upon the right that is embodied in the Sixth Amendment as well as Article 2 of the Arizona Constitution and clearly violated the rule in *Edwards*.

Your Honor, you can read on a piece of paper what occurred, and you may even be able to take a step further and sort of imagine what had occurred, maybe being familiar with the attorney-client room in the jail, as it's referred to in that transcript. But I would submit to you that until you hear some evidence about that particular setting, and it's brought forth in all of its -- in all of its detail, the extent to which it interfered with my client's right to counsel cannot be truly appreciated, and the subsequent result at the preliminary hearing on my inability to present any sufficient or meaningful notion of a proffer of evidence is likewise impaired.

I'd like to just kind of emphasize and point out some other things that are in that transcript, and I want to do so without vouching for the accuracy of it. I haven't listened to it, so I don't know if is an accurate or not.

But consider the following, please. We would submit, Judge, that by appearing in the attorney-client room and then starting out this process with that *Miranda* advisement, specifically where Investigator Hounshell says, "If you can't afford an attorney, you have the right to have an attorney appointed to you prior to questioning."

What that -- what must have that left in the Defendant's mind's like, "Well, I've got an attorney. I mean, he's been here a lot of times. So here we are on the eve of

the preliminary hearing. The last I knew, we were going forward with preliminary hearing. Why isn't he here? What's this guy talking about; that I get an attorney? Where is that coming from?"

The -- so right at the outset, Hounshell, either by design or inadvertence sets forth a scenario where arguably he's suggesting that, "Okay, Mr. Defendant, Mr. Roberts, you don't have an attorney, but we'll get you one if you want one, if you can't afford it." Doesn't even say, "We'll get you one if you want one." Says, "If you can't afford it, we'll get you one."

Now, he moves on from there, and unfortunately Investigator Hounshell thought that somehow that's the prophylactic that makes all of what he's about to do okay in the eyes of the law and legal, yet that was not the teaching on *Montejo*, because, as I urged earlier, *Edwards* assumed place.

And then he goes on to point out that he's there in the attorney-client room, which gives the suggestion that this may have something to do with an attorney; the possible suggestion to the Defendant.

And he goes on to say that he knows Inmon and Johnson. Well, I think only one need to not look too for or speculate too far of the notion that who's the number one enemy to Joseph Roberts in this case? Mr. Inmon.

And now we have a State's representative that is there saying that he knows him, suggesting there's an acquaintanceship. There may be something even more than that acquaintanceship. But he says, "I definitely know Inmon and Johnson."

On the next page, we see on page six of the State's response, we see in this transcript where he then mentions that the Defendant has the option to go to the preliminary hearing or the option to waive it. Never couched in terms of a right, and, again, he's diminishing or minimizing that particular right.

Then he goes on and gets into the heart of what is the truly offensive part of this -- at least the beginning of the truly offensive part of it, where he says, "If we do the preliminary hearing, it will be a tougher road."

Well, what does that mean? What must that have left the in the mind of the Defendant if one considers what information he had up until that point regarding the case, which necessarily impairs or impinges upon the attorney-client relationship?

We found ourselves in this impossible position of having to try to demonstrate to this Court that we're entitled to a dismissal because he's interfered with the attorney-client relationship, yet to do so we have to violate that attorney-client relationship and put information out there

that the Court otherwise -- or nobody on the face of this earth would be entitled to hear.

This all happened because the State decided that it was perfectly okay to send Mr. Hounshell in and start essentially compelling the Defendant to waive his preliminary hearing, get the plea agreement and close the books on this case.

So Hounshell says, "It's going to be a tougher road." What could be meant by that?

He goes on to fill in some of the blanks in a rather suggestive and very negative sort of way presenting this parade true horribles. But he premises it upon the notion that he says that the State is offering 25 years right now. That's what he says. That ain't so. The State offered life, with the possibility of release after 25 years.

So now not only do we have this horrendous violation of my client's due process rights, his right to effective assistance of counsel. We now have it being premised upon a misrepresentation of what the offer was.

So what does that leave in the mind of the Defendant where he's hearing from his attorney what the offer is, and the State's representative is coming in and telling him it's a different offer? It has to engender some massive sense of, at a minimum, confusion, and at the most, distrust.

So once that bit of misrepresentation has been

submitted, leaving the Defendant with questions of: What is it that he's been told about that? Is it true? Has the offer changed?

And then the State's representative launches into the threat of the death penalty and goes into an explanation of what the preliminary hearing is for; which is that not an attorney function to begin with?

And then it gets even better where he brings in the Defendant's wife, that she's involved, that she could be prosecuted, and even goes further to inquire about a child and the fact the wife had miscarried; inquired about all of that -- in fact, all that information that she was pregnant and she'd miscarried; wants to know if he's still talking with her. And he's laying all the groundwork for what is the last pitch that he tries to make here in the most intimidating and compelling way possible, and that is that they're going to start out by telling the Court what the plea offer was when they get into the preliminary hearing.

One other point before I get to that part, Judge, I really wanted to point out -- actually it's that -- I'm sorry -- and the chronology of it.

Yeah, that they're going to tell the Court what the plea offer was and he re-raised that they're going to seek nature life or the death penalty; other words, threatening to take his life. And urges him to think about what might happen

on the other hand, and it was up to him. And then reemphasizes the notion that his wife is involved and could be involved.

And then he, even at one point, urges the Defendant to waive his attorney.

At the bottom of page seven of the transcript, Hounshell says, "So if you want to go through with it, that's your right. If you want to waive your attorney -- waive the hearing, you need to get with your attorney today and let him know."

So he'd actually rounded the corner now from interfering with the right to counsel to doing away with it. I can't imagine a more insidious set of circumstances that impacts one's right to counsel.

The State's response seems to be suggestive of the notion that the Defendant did not assert his right to counsel. I would ask the Court, in evaluating that, to consider the order of the Justice of the Peace wherein she indicated in one of the earlier orders that a petition for appointment of counsel had been filed and that the -- that I was appointed to represent the Defendant. And that document is Order of Appointment of Counsel, dated September 30th, 2009. Clearly says a Petition for Appointment Counsel had been filed; appoints me as attorney to represent the Defendant.

But when the State, even in response to the motion

to dismiss, suggests that, "Well, he didn't invoke his right, and therefore -- his right to counsel, and therefore this case is kind of like the *Montejo* case." It's not. It's not even close.

In *Montejo* the defendant was arrested for a certain offense. He was appointed counsel that morning, and within hours of the time he was appointed counsel on that offense, he started a process of essentially confession to another more serious offense. It was a homicide to which law enforcement responded. He showed them the scene, et cetera, wrote an apology letter to the victim's relatives, and it was an unrelated crime.

We don't have that here. What we have is all within the same allegations is the State attempting to get the Defendant to waive his right to counsel, waive his right to a preliminary hearing, and take the plea offer that they had made under threat of death, and prosecution of his wife.

Edwards teaches us that: Well, the remedy for all of this stuff is that you suppress whatever the Defendant said. Well, if you look at that transcript, except for what his age is, married, and what became of his -- the pregnancy of his wife, what is there to suppress? So because there's nothing to suppress, the States gets a free pass. That's only if we look past the notion that the Defendant's relationship with his lawyer has been irreparably harmed through that

stunt.

There's no way to fix it, and we would urge the Court apply, as set forth in *Warner*, to address that, consider all of the evidence that could be presented on that point, and make a determination of whether this is one of those rare cases in which the only remedy to vindicate a very, very important bedrock right of our Constitution; is for dismissal.

THE COURT: So, Mr. Martin, that all prefaces your request that I set this for you're calling a *Warner* hearing and hear testimony, evidence about the interference specifically with Mr. Roberts's right to counsel?

MR. MARTIN: Yes, ma'am.

THE COURT: Okay.

Mr. Beatty, do you want to respond to that?

MR. BEATTY: Certainly. Of course, Judge.

ORAL ARGUMENT

BY MR. BEATTY:

The -- as I've argued actually in both of my responses, the *Warner* case is not relevant in this case, and the reason for that is *Warner* case had to with attorney-client communications. There's nothing about the transcript that we have in my response to the motion to dismiss indicates any kind of intrusion into the actual communications. In *Warner*, he actually -- the police -- the sheriff actually took documents, and those documents included transcripts of

meetings between the defense attorney and the client. And we don't have that in any way, shape or form.

What we have is the deputy or I guess the investigator making a lot statements to Mr. Roberts and Mr. Roberts basically acknowledging those statements made to him with the guttural uh-huh sort of response, and not even a yes, except for when he says specifically to him to -- when he told his rights, "Do you understand rights?" He says, "Uh-huh." And then they ask specifically for a yes (indiscernible).

Because of that, I've never heard of a *Warner* hearing, but even if we could formulate what that would mean, I don't see how it's relevant here because we're not talking attorney-client communications. So if that's the kind of focus right now for the Court to question, I think that we should not have a *Warner* hearing because I don't think it's relevant in this case.

Even if -- even if we assume everything that -- all the guidance of the *Warner* case would give us, one, it's not relevant because the communications -- the protected communications between Mr. Martin and his client were not invoked. Now, if there was -- I guess were not impeded upon. If what they're saying is, "Well, because of that visit" and they get into the other issue.

"Because of that visit, now Mr. Roberts has an issue with me as his attorney."

And we maybe hear evidence on that issue, but they -- we just don't have the factual framework to have a hearing on the *Warner* case because we don't have a seizure of documents. For instance, if they -- if they sent a deputies or the Sheriff would've gone into his jail and would have taken magazines and that sort of thing, not transcripts of attorney-client communications, well then we might be getting into something that would indicate that -- well, we don't know. We don't know about import of those magazines.

Maybe they were magazines on the law or magazines on anti-death penalty, or something along those lines that would maybe assist him, Mr. Roberts, in learning more about the circumstance he's in, in which case there might a privileged communication that was maybe improperly seized.

We just don't have that circumstance here. That's -- I guess that's what my argument is.

So I just don't think that (indiscernible) just make it a *Warner* hearing, we have no problem with that. I just don't think even if everything was proved the way that Mr. Martin has said it's going to proved, *Warner* doesn't apply in this case. *Montejo* applies. And so I don't think it's going to do us any good to have a *Warner* hearing.

THE COURT: And I appreciate the comments from both of you. I'm not certain that calling something "a *Warner* hearing" is what we need. I am concerned that -- I mean,

clearly I read the transcript as well, and Mr. Roberts didn't confess, didn't say things to the investigator from the County Attorney's Office that incriminated himself, at least to the extent that I could see. But also based on the face of the documents I've received, it appears to me that -- and again, this is about hearing evidence -- that the State went far beyond what would be permissible in *Montejo* in infringing on the Defendant's Sixth Amendment right to counsel.

I guess what I don't know is effect. And I think that's what Mr. Martin is asking; that he be permitted to present evidence about is the effect that visit had on Mr. Roberts' right to counsel. Again, this is -- this is sort new ground. I don't know.

And then I suppose the next step is if I found that there was really was an infringement that affected Mr. Roberts and his ability and his attorney's ability to represent him, then we go what an appropriate remedy is. And I don't know if that's dismissal, if it's change of attorney, if it's some sort of sanction against the State. I don't know.

But there are a lot of things I don't know. I'm accepting what Mr. Martin said today is basically and avowal that these are the things that you will hear in a hearing, and that in fact that gave rise to some issues that interfered with Mr. Roberts' being effectively represented by his attorney.

I think we need to have a hearing before I can decided the motion to dismiss if those are the avowals that you're making. I'm not sure who testifies at that hearing. You know, I guess Mr. Roberts. I don't know.

MR. MARTIN: If I may, Judge --

THE COURT: Uh-huh.

MR. MARTIN: -- on that point.

ADDITIONAL ORAL ARGUMENT

BY MR. MARTIN:

You said it's on new ground. And one of the -- one of the thoughts that's crossed my mind is that in *Warner* -- and I'm not going to repeat the whole thing. I'm sure the Court's read what I wrote, but starting at page four of my motion over onto page five, *Warner* set out some factors, and it's really a test.

And I don't mean to be sort cute in characterizing it as a *Warner* hearing. I just didn't know what else to call it; a hearing pursuant to *Warner*. But it seems like when the Court in *Warner* was saying the Court must make separate and detailed findings regarding -- then it gives out the test, to me, that's gist of the hearing.

And the trouble with *Warner* is that it doesn't -- it doesn't -- the facts in *Warner*, I will grant you, as the State has argued, are different than the facts here. We don't have the seizing of an attorney-client transcript and saying, "Oh,

this is that they're thinking; the defense." But we have something that is far more subtle, but maybe even more insidious in the sense that it made a suggestion to the Defendant that he ought to take the plea offer that's been made, sort of running roughshod over everything that had possible been said between the defense and -- or between the Defendant and his attorney and engendering this notion about what is going on with the attorney.

Now, *Warner* doesn't give us any guidance with that, but I was hoping that if we're going to have a hearing in which that's going to get fleshed out so the Court can follow the test that was set out in *Warner*, as it applies to this case, then we have some parameters on how that testimony can or cannot be used in the future by the State against the Defendant.

I believe there's a Rule of Criminal Procedure that talks about matters being not useable in the future unless the Defendant testifies differently to it at some point in the future. I'm also aware of some case law interpreting that rule that expanded it out to if the Defendant asserts theories that are inconsistent with what his previous statements under oath were, then those statements can be then brought into impeach even those theories even though the Defendant doesn't subsequently testify, I think.

Those are parameters that I think need to be fleshed

out as much as we can find it in the law. The trouble with doing this is, to a certain extent, I think we're all upon new ground here. I know of no case, no reported case in Arizona. I haven't looked outside the State of Arizona except to read that *Montejo* case. Should we look for a set of facts that's on all fours with what we have here, and how it was dealt with in that situation.

So if there is going to be a hearing, I think that in advance of that hearing, there needs to be some pretty clear identification of the parameters of whatever Mr. Roberts says or whatever other evidence might be produced and how that can be used later against the Defendant by the State.

One final point, if I might, Judge, it's not exactly what we're talking about, but I would also like to point out that at -- in this analysis, it is the State's burden to show -- and I believe that burden is beyond a reasonable doubt that the -- what happened here was not prejudicial. And the Court in *Warner* also recognized that there may be situations in which it's not possible for the prosecution to show prejudice.

Goes on to say that:

> "Dismissal of the charges, although an obviously extreme sanction, may be the only remedy in order to protect a citizen's fundamental rights."

That's what I was alluding to earlier by the bedrock of one of our constitutional protections is that you may not

have any other choice in this case, depending upon what you hear and applying the *Warner* test. So, with that Judge, I'll leave that subject alone. Thank you.

THE COURT: Did you want to respond to that, Mr. Beatty?

MR. BEATTY: I do, Judge, yeah.

ADDITIONAL ORAL ARGUMENT

BY MR. BEATTY:

I'm kind of chomping at the bit here because, for instance, the defense attorney said, "Oh, this conversation that happened on February 4th is basically saying, 'Defendant, you ought to take this plea.'"

Well, whether or not that's what it says -- and I didn't read that in the transcript. Maybe the Court did. But what I do know is he showed up on February 5th, and they had a preliminary hearing. And then six weeks later, they continued the hearing. At no point did he agree to take the plea.

There has been no prejudice whatsoever on this other than it's an issue that's been raised, but nothing's actually happened other than we proceeded on, and he was made aware of the fact that there's a plea offer out there that expires when the preliminary hearing starts on February 5th.

So I think that however we're going to formulate whatever this hearing is going to be, we have to keep in mind at the end of the day the Defendant made no incriminating

statements, no anything that could even be impeached. As far as I'm concerned, we'd be willing just to drop all of the things that he said in here and unless the defense wanted to bring up without agreeing that what the investigators did was wrong or anything, because we still think the *Montejo* case does apply here.

But what they did was well within the rights of the investigators. It may not be something that we want to see every day, but I don't know if that's the issue before us. We are here on this one case with this Defendant, and the investigators went in there, and they advised him of his rights, they made sure he understood the plea offer in the case and what the affect of going to the preliminary hearing the next would have. And that's it.

He said he understood that. Boom, done. And then he goes in the next day, and they proceed with their preliminary hearing.

So there is no prejudice, and when we get to -- that's why I brought up that other case, the *Morrison* case, that's listed by *Warner*. *Morrison* says, "Okay. You know, strike all that. Strike all the statements made by the Defendant." If that's the punishment.

The remedy is to excise the bad part; not to get rid of the entire case. That's what the teaching of *Morrison* is for us. And as far as I know, *Morrison* is still good law.

So, I -- first of all, I don't think it's relevant because *Warner* is completely about communication. This isn't about communications. When he's talking about -- Mr. Martin, when he's talking about all these things affect us in the attorney-client room, and I come from a different county, so I don't know what that means, but I imagine it's just citing a location within the jail to have that. I can't imagine that it's something, you know, special. "Make sure your attorney is here," or something like that. It's just a place where they can have a conversation when nobody else is around.

He does say -- at the beginning, Mr. Martin talked about, well, you know, if you -- you have a right to have the attorney if you so desire. It's there on page five of the transcript.

He was told that he -- if he wanted to have an attorney, and didn't say "Hey, you know what? I do have an attorney. I'd like to have my attorney present for that."

So I think that we're getting -- it seems to me at least so far we've talked about it, it's getting us off base. Unless what the real is, should the investigators have gone in there. Is that what the real issue is about we're doing here today, and should we have a factual evidentiary hearing on that?

I think that that's a different issue, but as far as *Warner* applying, it doesn't apply because this doesn't have to

do with communications. And *Warner* remedy is to excise whatever was said inside a meeting if it's something that should be excised.

But *Montejo* went -- you know, 20 years later comes up and says, "No. We're going to use all that stuff. You're going to show us where the -- where the weapon is. We're going to use that in court. You wrote a letter to the victim apologizing for what you did. We're going to use that in court." That's what *Montejo* (sic) about.

And yet in this case, the defense is talking about dismissal of charges when the Defendant didn't say anything. He didn't talk about any of the evidence, he didn't talk about any communications with his attorney, any theories of his defenses, he didn't talk about any defense witnesses. All he talked about -- he didn't talk anything until there was -- they come to a side conversation about Mr. Roberts' wife and the fact that his -- they lost their baby. And that was it.

And there was no implication with that that now somehow that fact was going to have some kind of impact on his trial.

So anything to do -- I -- just the way I read the case and having gone through all the police reports that I've been able to find, *Warner* doesn't apply in this case. *Montejo* applies.

And if we're going to have a hearing that's going to

use up valuable Court time and valuable -- everybody else's time, then we ought to have it on the -- on what the real issue is. But the real issue is on its face, the investigators shouldn't have gone in there. Then let's talk about that. Let's have a hearing on that and figure out what it is.

But from our perspective they were allowed to do that under *Montejo*. So, I mean, I'm going to argue it that what happened on February 4th doesn't have the impact in this case that the defense is arguing.

But certainly, I don't see how the *Warner* case applies. And I know Mr. Martin says factually it doesn't -- it's not the same thing, but we should use it anyway. Well, that's not how we do this. The facts are different there because that is the communications between the attorney and the client. That's what that had to do with.

And this had nothing to do with attorney-client privilege at all. And what the *Warner* case was really upset about was the Defendant has a right to have an attorney who represents him, and he should be able to say anything he wants to that attorney, and his attorney should be able to say anything that the attorney wants to to him, and to have that relationship. And that can't be invaded at all.

Well, we don't have that in this situation. We don't have an invasion into their relationship at all.

All we have is the investigators saying, "Here's your plea offer. This is your situation, and the offer ends tomorrow; 24 hours from now."

And so we don't have that invasion that the -- what we all know to be a very special right we have in the United States where we have this privilege between the attorney and the client, but we don't have a violation of that in this case.

And so that's why I said, you know, let's have a hearing if that helps to clear up the record, but ultimately I think that even after all those facts come out, the Court's going to find that it's not relevant under the *Warner* case, and the *Montejo* case covers what the -- what the investigators did. That's all.

THE COURT: I haven't actually heard much that I've disagreed with from either of you today, but we're talking *Montejo* and *Warner*, and I'm not really not thinking along *Montejo* and *Warner* lines, although obviously they're important.

I think that the hearing that I'm going to set needs to address two things, at least. First of all, the first issue is when the investigators went in and spoke to Mr. Roberts, was that in violation of the Sixth Amendment under *Warner* -- under *Montejo*? Whatever. So that's -- Mr. Beatty, that's your -- should they have gone, number one.

And number two: Did that then affect Mr. Roberts' right to counsel to the extent that he can't be represented adequately in this matter. And I think I've worded that poorly -- that second part poorly, but --

So I guess Mr. Martin said something about the State having a burden to show that there's no prejudice. I don't think the State can go -- the State can certainly go forward in a hearing and put on investigators and show this is what we did and this why we did it. But -- and this was the result. I don't think the State then can delve into what happened in Mr. Roberts's mind. So that -- then the burden that at point would shift to Mr. Martin to show that there was in fact some prejudice, for lack of a better word.

Does that make sense?

I don't think the State would have the ability to show that based -- at least based on the information I've seen to this point; we heard a transcript, we've heard in the transcript what Mr. Roberts said, and that's all the State's got, I assume.

MR. BEATTY: That's all we've got, Judge. I mean, we can -- we can bring in the investigators to say this is what we did. I imagine they're going to say very similar to what (indiscernible; simultaneous conversation) --

THE COURT: Uh-huh. And I don't care if some of -- if -- you know, if there are agreements to stipulate to some

of those things coming in on the record. I'm not -- certainly I need to hear from every one of those folks. I've looked at -- I've read several times through the transcripts and through the pleadings as well as through case law, and, you know, frankly I have some concerns about the should they have part of it and a lot of unknowns about what the result was.

MR. MARTIN: Judge, when you asked if that made sense, it makes sense, and I understand what you're saying, and I think I understand even beyond that why you're saying it.

The language from *Warner* states:

> "Since the burden lies with the State, there may be situations where it is not possible for prosecution to proceed. It has to prove the invasion was not prejudicial."

So those words suggest a couple of things to me. Number one: The initial burden, if not the entire burden, at least the initial burden is on the State. There may be the shifting burden that you have alluded to, and I probably need to back and re-read *Warner* and its progeny. There's cases that came after *Warner* interpreting it.

And frankly, Judge, those cases that came after *Warner*, at least from a defense perspective, scale back on *Warner* somewhat. But *Warner* seems to be the seminal case from which those cases flowed, and then scaled back on it some. So

I think all of those cases would be instructive as well, but I don't know that that shifting burden is within *Warner* or its progeny.

Secondly, the standard of proof is still, as *Warner* concluded, I believe, one of beyond a reasonable doubt. And it would seem that if we're talking about the affect of the right to counsel and to the extent he can't be adequately represented, that's the measure that ought to be applied to this upcoming hearing.

THE COURT: In response to that, Mr. Martin, though, if -- I mean, and, again, what I read are the pleadings and the transcript, and I think based on that, that the State could very well in good faith say, "No prejudice" --

MR. MARTIN: Uh-huh.

THE COURT: -- "Judge." And so maybe the words "shifting the burden" is inappropriate, but I think very well in fact just what's before me, I could say, "Oh, yeah, there were lots of infringements, but no prejudice because Mr. Roberts didn't say anything. He didn't confess. He didn't" -- you know, because at that point, the State's told me everything they've got and the final result is what Mr. Roberts's response that the State could see.

What?

MR. BEATTY: And he went forward with the hearing.

THE COURT: Right.

MR. BEATTY: I mean, if this --

THE COURT: So maybe shifting --

MR. BEATTY: I tried to shift (indiscernible; simultaneous conversation).

THE COURT: -- maybe shifting the burden is the wrong word to use, but at some point I probably have hear some evidence to show that there was prejudice. If the State comes forward with everything they've got and shows me that there's not --

MR. MARTIN: I understand that, Judge. And that then puts us in a conundrum that I alluded --

THE COURT: Yep.

MR. MARTIN: -- to in my opening; is that, you know, do we -- do we waive one constitutional right for another one? We're leaning beyond the horns of that awful dilemma but for what the State put in motion.

THE COURT: And I appreciate that, and I think that it's important that that's a matter of record. I would anticipate that and in any hearing Mr. Roberts would testify that his testimony could not subsequently be used unless it were different than prior statements or subsequent testimony. I think that's pretty standard.

MR. MARTIN: Very well, Judge. I welcome the opportunity for that hearing, and we'll do the best we can to flesh this out for the Court and try to vindicate Mr. Roberts'

rights.

I would urge, Judge, that there be some briefing of this before we get into this hearing only because I think if we all know the legal landmarks, mileposts along the way, the hearing would be perhaps more effective.

THE COURT: I don't have a problem with briefing. We'll talk about that in just a moment. Is there anything we can accomplish today in terms of this? If argument on the new finding of probable cause, since we're all here.

MR. MARTIN: I'm --

THE COURT: Oh, it -- I guess it's review of preliminary hearing rather than specifically further questioning (indiscernible).

MR. MARTIN: Judge, there's probably a few things we can do, Judge (indiscernible; simultaneous conversation) --

THE COURT: I mean, I'm thinking there was a lot of discussion about each of the particular counts and whether evidence was presented as to those. I may hold off on any ruling until after we have our next hearing, but I think I could hear argument on those things today. I think counsel's prepared to go forward.

MR. MARTIN: Sure.

THE COURT: All right. Mr. Martin, let's start with you then.

MR. MARTIN: Okay. Thank you, Judge.

ADDITIONAL ORAL ARGUMENT

BY MR. MARTIN:

Within my reply, Judge, I have attached a couple of what I was intending to have as exhibits. And the State's response seemed to qualify the notion that there was a Bar complaint filed, and I want the record in this case to be clear that there was indeed a Bar complaint filed, and since we last addressed that subject in open court, probable cause has been subsequently determined, and there's a letter from the Bar attached to my pleading to demonstrate that as well.

Moving on from there to the subject of the State and its outline in its response, which I appreciated, was the notion of duplicitous charging. I think the State is correct, Judge, in the extent that they have cited *Axley* -- *State versus Axley* and what it stands for.

And my only response to that is, in other words, the State has pointed out, I think correctly so, that there is one charge of first degree murder can be committed by committing a felony murder can be committed by committing murder with premeditation and that charging both in the conjunctive and disjunctive by and/or in the indictment does not violate the rule of duplicity in a charging document which, and as we all know, brings into play the notion of double jeopardy and putting one conviction of the Bar to another conviction, et cetera.

The problem, though, that seems to be identified in the case law, and I tried to plead that out, is that the Court even in *Axley* seems to fudge a little bit and say, "Well, even if it were duplicitous, you can fix that with a jury instruction."

That's the part that I would still continue to seize upon urge that that charge should be separated out, and that we therefore are going into this case early on taking the risk that jurors may not be too terribly attuned to the distinct elements between felony murder and first degree murder, such that they're going to be able to -- we're going to be able to know for sure what it is they're voting on and finding on.

The case I also cited was *Spencer*, and *Spencer* adds something else to the analysis. It said that an indictment that charges separate or multiple crimes in the same count is duplicitous.

Again, if we -- this may be just one of those mind bending exercises on the meaning of certain words, but if there are multiple crimes of first degree murder within that first degree murder statute, then charging both felony murder and premeditated murder in the same count of the indictment is duplicitous. That would seem to be directly contrary, and it seems like the court in *Spencer* may have been intending to use the word "separate" and "multiple" as synonymous. But I think plain meaning of those words would suggest otherwise.

So I think the duplicities argument, the Defendant is frankly probably on the losing side of that, but I still think there's some concerns that I'm not conceding the whole subject, but it's close as I'm going to get to a concession.

With respect to the premeditation, Judge, I would urge you to -- I pointed out in my response what I thought. I tried to meet some of the State's arguments. I was lacking the premeditation, and I think that the Court needs to take a real hard look at that transcript to see if there was some premeditation that could be shown, at least at the level required for a preliminary hearing.

I don't take much issue with the State's argument about the standard for a probable cause determination. I think it's all -- it's all accurately stated.

I would continue, though, to argue the duplicitous argument as it relates to the felony murder. There's all of those underlying alleged crimes are in fact duplicitous in the sense that there's multiple underlying crimes that have been alleged to support the felony murder. And the Defendant's ability to defend against those is broadened out, maybe unnecessarily, by having alleged those.

Moreover, sure, you could be convicted of felony murder based upon the underlying offenses, but how do you know which underlying offense that you're actually being found to be guilty of as a predicate to a felony murder? I'm sure the

State's going to probably respond that you don't have to be found guilty of the underlying predicate in order to be found guilty of felony murder. I think at least that's what the State's response will be.

With respect to the conspiracy charge, Judge, (indiscernible) to a less -- to some extent with respect to the first degree murder charge. I think that the Court ought to pay particular attention to whether or not the evidence independent of the words that are attributed to Mr. Inmon can support those charges.

My understanding is that Mr. Inmon is -- has entered a plea, and part of his plea is to testify against the Defendant, and that he has since then sought a competency evaluation, which this Court has denied, and that in the face of that, he has now moved to withdraw his plea. I think those are a factor to consider because if he withdraws from his plea, then at least potentially, then there's a real potential that Mr. Inmon may not be available to testify against the Defendant if allowed to withdraw from his plea. How that -- how that consequence impacts Mr. Inmon's case, I don't know. I don't even know if it does.

But if he is allowed to withdraw from his plea, then I think it has a direct consequence on whether or not there is any probable cause if his testimony against the Defendant can't be obtained. I don't know if it can be or not, but it

certainly casts it in a much different light than the way it existed at the time this preliminary hearing was conducted.

That gets to the point too that we weren't allowed to bring in Mr. Inmon in our preliminary hearing, as we sought to do. Had we been able to do so, I'm not sure exactly what he would've said. But I think that there's a reasonable chance that he would've refused to testify.

We stand on -- with respect to the conspiracy count, Judge, we still stand on the notion that one cannot be convicted of a conspiracy to commit first degree murder when that commission is based on a commission of felony murder. And that's the *Evancheck versus Stuart* (phonetic) case that we cited. I don't know that the State has actually addressed that. If it did, I wasn't able to discern it.

With respect to the theft count, the theft, our complaint there was that it failed to cite to either a subsection of the theft statute, making it difficult for the defense to determine what part of the statute to defend upon, and, again, spreading our resources relatively thin to have to address all of them in order to try to avoid some surprise at trial. Again, in terms of analyzing subsequent to the probable cause determination, what the Court may have been going on, it could be left to anybody's guess at that point. Again, it creates less than an appropriate record.

With respect to the charge found in Count Four of

the Amended Complaint regarding mutilation, unfortunately the Arizona Legislature didn't give us a legal definition of mutilate, and instead we're left therefore to rely upon the commonly understood meaning of it, if I have correctly cited the process of statutory construction and interpretation. And our suggestion there is there was actually no evidence presented at the preliminary hearing that the Defendant either directly or as an accomplice liability cut off or destroyed a limb, a rather essential part of Mr. Achten or that he rendered him imperfect by exercising or radically altering --

THE COURT: Uh-huh.

MR. MARTIN: -- a part of Mr. Achten's body.

With respect to the concealment charge, Judge, there are elements of that that were not touched upon during the preliminary hearing or any evidence from what you read. No inkling could be made relative to whether or not -- or what the Defendant's intent was with respect to that.

With respect to the charge of tampering with physical evidence, there was absolutely no evidence presented with respect to the Defendant's intent to make a body unavailable in an official proceeding or had been pending or which the Defendant knew was about to be instituted. There was no touching on that.

Folks involved in law enforcement ranging from prosecutors, police officers, deputies to defense attorneys

may make that sort of assumption, but I think when we're talking about ordinary individuals without any background in law enforcement, as demonstrated in the record, that there needs to be at least some proof of that with respect to that very specific crime.

With respect to Counts Seven, Eight, Nine, Ten and Eleven, I think we tried to deal with those all in the same manner in suggesting that there was entirely a lack of any evidence of the Defendant's intent to hinder a prosecution of any of those individuals and that the record was absolutely void of that is presented to the Justice of the Peace.

Thank you, Judge.

THE COURT: Thank you.

Mr. Beatty, did you want to respond?

ADDITIONAL ORAL ARGUMENT

BY MR. BEATTY:

Judge, if I don't hit on something I did respond to virtually of all these accusations in my response, and so I just incorporated that response for the Court's review later on.

With regard to the fact hat this is alleged to be duplicitous, it's not. The *Axley* case is certainly on point on with that, and it's the seminal case law for that issue. Whether or not evidence of that comes in for the purposes of a jury deliberation, that comes down later. It comes in at the

end of the trial, depending on what the evidence is that comes out on what is supported by the evidence.

With regard to the -- just the Information itself, because I know the statute, because I've been on notice about premeditation, and we put him on notice about whether it's premeditated or first -- or a felony murder, put him on notice about what the conspiracy has to do with. All of that stuff is -- put them kind of on notice on what the State might be pursuing for charges, and pursue something that's out there, unless the Defendant agrees to it.

With regard to the status of Mr. Inmon, I'm not involved in that case at all. I put in a email and a voicemail message for the defense attorney Bruce Griffen, and he never got back to me. So I don't understand what that is. Maybe I used the wrong email address or I talked to the wrong secretary or something like that. But I haven't talked to him specifically about anything with -- regarding Mr. Inmon, and I don't have any contact with the County Attorney's Office here except for getting documents from them that that I think that they have. But I haven't talked to, for instance, Mr. Brannan or Mr. Whiting about anything to do with any of the cases. We're trying to keep that wall up.

With regard to the -- this thing where they -- the burning of the body, I don't understand how that cannot be mutilation when you're rendering something imperfect. One way

of doing that is burning off perhaps any evidence that might be on there, or any other evidence that might associated with the body or just to change it from the figure it was before the body was burned. I'm not quite sure I understand where that comes from.

With regard to the concealing, obviously they were trying the bury the body. In fact, they ultimately -- they did bury the body, after -- as I said, after they -- the burning of it, and then they burned it, and that's in the reporter's transcript from February 5th on page 29. I cite that on page 13 of my response.

So I don't know how that -- by burying the body, how that is not something where -- the concealing -- I mean, obviously they're concealing. They're trying to keep the body away from police. And that's easily from what happened at the preliminary hearing.

My other response is, Judge, when the Defendant tells the investigators that they're -- you know, he doesn't know anything about the case. He denies involvement; denies everything, which is what the evidence was at the preliminary hearing. Then he is hindering prosecution of these other people, and that's what the charges are. I believe it's Counts Seven, Eight, Nine, Ten and Eleven, as I've pointed out in my -- in my response.

So as I read the preliminary hearing transcript, I

thought all the evidence was there for probable cause determination. And it's certainly not a mini trial. It's not -- it's not a trial beyond a reasonable doubt and so forth. There's probable cause.

So I thought as far as that goes, all the evidence was there for the magistrate to make a determination fairly on that and to come to her conclusion. That's all.

THE COURT: Mr. Martin, did you want to reply?

MR. MARTIN: No.

THE COURT: All right. I will take those things under advisement. I don't -- depending on when we have our next hearing, I may or may not rule on them prior to the hearing.

I think in terms of the hearing that we discussed earlier, I would like my court administrator to get with each of you and your calendars and my calendar. She reads -- we have this new calendar in the system, but it's not always readable to me.

MR. BEATTY: Okay.

THE COURT: And so I'll direct her to contact each of you to set up a time for that hearing, but what I want to know is how much time you think we'll need for it. Kind of helps.

MR. BEATTY: Judge, can we have just a moment?

(Counsel confer.)

MR. MARTIN: On that point, Judge, we have a preliminary hearing transcript that I think extracted some of the elements of the test in *Warner* that might be pertinent if that is the test. If I did have him testify, it would be pretty abbreviated. It would not be a repeat of everything has been testified to by Investigator Hounshell at the preliminary hearing.

We need to take a look at the test, compare that to what I see in the transcript and make a determination of whether I either can extract a stipulation from the State or have to produce some additional testimony from one or both of those investigators.

MR. BEATTY: Not a direct answer (indiscernible; simultaneous conversation) --

THE COURT: Right. And I'll let you two discuss that because there is -- there is a lot of information in the preliminary hearing as well as the transcript of the actual interview with the Defendant. So certainly that, I don't have a problem with reading that rather than hearing that live if you all decide that's what's best.

MR. MARTIN: Can we get with your court administrator today?

THE COURT: Yes. You can get with her today, but she's going to want to know how much time to set aside.

MR. MARTIN: Sure.

MR. BEATTY: That's fine

THE COURT: So that's going to be the real issue.

MR. MARTIN: Back to the question then, I think if we set it for three hours, it would be safe.

MR. BEATTY: Yeah.

THE COURT: Okay. All right. So we'll -- I'll say half a day.

MR. MARTIN: Okay.

THE COURT: And then that'll give her some guidance. In terms of briefing schedule, do you want me to set a briefing schedule? I don't, you know -- did you anticipate you wanted to brief anything else, Mr. Beatty?

MR. BEATTY: Not really, Judge. I mean, obviously the Court gave us a couple questions to go off of, but I was going to actually ask that. If we're going to be briefing, I just want to make sure we know what the issues are, so.

THE COURT: Yeah. Let me throw out -- I mean, I think I've broadly defined the issues. I guess one of the issues that -- and maybe this goes to the broad definition of issue about should the investigators have done this or not. Is -- and I note in your response that several times you say that the Defendant never invoked his rights, and maybe some clarification on what you mean by that, because I agree with Mr. Martin that at one point in time he invoked his right, so did he un-invoke them and, you know, how does that fit within

the framework of Constitution and the case law. That was a bothersome issue, a little bit, to me, and if you want to expand any on *Montejo* and does it allow that action or not, you can. I don't know that it's -- I mean, I don't know if that's helpful, but if you feel like it would be.

MR. BEATTY: Okay.

THE COURT: Mr. Martin, did you have something in particular you wanted to raise?

MR. MARTIN: Judge, I was going to -- without conceding where the burden lies in all this, and maybe that ought to be some subject of the briefing as well, but I was going to suggest simultaneous --

THE COURT: Okay. Why don't --

MR. MARTIN: -- briefing.

THE COURT: Yeah. If you want to brief any issues that you feel will arise at that hearing, I will need them five days before the hearing.

MR. MARTIN: Okay.

THE COURT: And since we don't know when the hearing is, I'll let you figure that out as soon as we get a date from the court administrator.

MR. MARTIN: Very good.

THE COURT: Okay. Anything else today, gentlemen?

MR. MARTIN: No, Judge. Thank you for your time.

MR. BEATTY: No.

MR. BEATTY: Thank you.

THE COURT: Okay. Mr. Martin, do you know where Betty is?

MR. MARTIN: I do, and I'll be happy to show him today.

(Whereupon, the proceedings were concluded at 2:12:04 p.m.)

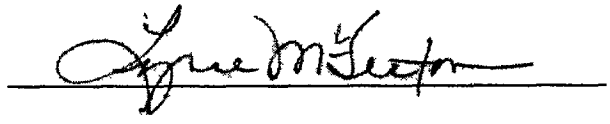
* * * *

C E R T I F I C A T E

I, LYNNE McSEATON, CERT, do hereby certify that the foregoing pages numbered 1 through 45 constitute a full, true, and accurate transcript from a copy of the electronic recording of the proceedings had in the foregoing matter, all done to the best of my skill and ability.

I further certify that I am in no way related to any of the parties and that I am not in any way interested in the outcome thereof.

SIGNED and dated this 21st day of April, 2011.



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